87-150

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KARL SCHERMER & CO.,
a foreign company, PETITIONER,

v.

ALPHA INTERNATIONAL,
a corporation, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

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QUESTIONS PRESENTED

1. Whether the Hague Service Convention procedures for service of process on a citizen of the Federal Republic of Germany sued by an American plaintiff are mandatory and supercede state court rules for service of process.

2. Whether substituted service of process in contravention of the Hague Service Convention on a citizen of the Federal Republic of Germany violates due process of law.

PARTIES TO THE PROCEEDING AND STATEMENT REQUIRED BY RULE 28.1

Plaintiffs Fernando Macri and Sonia Macri, citizens of the State of New Jersey, brought suit against defendants Bermelon, Inc., Max Cohen and Respondent Alpha International. Respondent Alpha International filed a third party complaint against Petitioner Karl Schermer & Co.

Karl Schermer & Co. is a company in the Federal Republic of Germany with no parent companies, subsidiaries or affiliates.

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ALPHA INTERNATIONAL,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

Karl Schermer & Co. respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of New Jersey, Law Division, Union County, from which the Superior Court of New Jersey, Appellate Division, and the Supreme Court of New Jersey denied leave to appeal.

OPINION BELOW

The opinion of the Superior Court of New Jersey, Law Division, Union County (App. 1a) is unreported. The Superior Court of New Jersey, Appellate Division, and the New Jersey Supreme Court denied by unreported Orders (App. 7a, 8a) Petitioner's motions for leave to appeal.

JURISDICTION

The Order of the New Jersey Supreme Court denying Petitioner's motion for leave to appeal was entered on April 28, 1987. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

This petition raises an issue which is very similar to that raised by the Petition for a Writ of Certiorari in *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 145 Ill. App 3d 594, 99 Ill. Dec. 379, 495 N.E.2d 1114 (App. Ct. 1986), app. den., 112 Ill.2d 595 (1986), pet. for *cert.* pending, 55 U.S.L.W. 3476 (no. 86-1052, 1/13/87). The Court should review these matters together because both present the question whether the Hague Service Convention procedures for service of process on a citizen of the Federal Republic of Germany are mandatory. In *Volkswagenwerk Aktiengesellschaft v. Schlunk, supra,* the court below avoided the strictures of the Hague Service Convention by characterizing an American-based subsidiary of the defendant as an involuntary "agent" for receipt of judicial documents on behalf of the defendant. In this case, the court below evaded the Hague Service Convention requirements by ordering substituted service of process on a company alleged to be but which is not in fact the insurance carrier for Petitioner—defendant.

TREATY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Convention On Service Abroad Of Judicial And Extrajudicial Documents In Civil And Commercial Matters ("Hague Service Convention"), 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163, is reprinted at App., 26a-46a.

The United States Constitution, Article VI, clause 2:

> . . .all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The United States Constitution, Amendment XIV, Section 1:

> . . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

New Jersey Court Rule 4:4-4(i):

> If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.

STATEMENT OF THE CASE

Summary

The Superior Court of New Jersey, Law Division, Union County, held that Respondent did not need to comply with the Convention On Service Abroad of Judicial And Extrajudicial Documents In Civil And Commercial Matters, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163 ("Hague Service Convention") when serving a summons and third party complaint on Petitioner Karl Schermer & Co. ("Karl Schermer"), a company in the Federal Republic of Germany. In so ruling, the state court held that service of process was sufficient when it was made on an American company (Allianz Ins. Co.) which in this case performed some functions similar to those performed by an adjusting company for Petitioner's German insurance carrier, Allianz Versicherungs-AG. Without reviewing any contracts or insurance policies, or hearing live testimony, the court concluded that Respondent had made a *prima facie* showing that the California company was in fact Petitioner's insurance carrier and could therefore accept service of process for Petitioner notwithstanding the Hague Service Convention.

The method of service of process sanctioned by the state court in this case conflicts with the Hague Service Convention and the Supremacy Clause of the United States Constitution. The substituted service of process authorized by the court below violates due process of law.

The Hague Service Convention

The Hague Service Convention is a multi-national treaty designed to protect the rights of parties to civil litigation by prescribing a fundamentally fair, reliable and inexpensive system for service of process and other judicial documents on persons who are citizens of the 24 nations which ratified the Treaty. The Preamble to the Hague Service Convention states that its policies are to ensure that judicial documents served abroad "shall be brought to the notice of the addressee in sufficient time," and "to improve" the procedure for service of judicial documents on foreign nations by "simplifying and expediting" the process. App., 26a. The Convention specifically states that its procedures for service of judicial documents abroad are mandatory and exclusive: "The present Convention *shall* apply in *all* cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Article I, App., 26a (emphasis supplied).

Under the Hague Service Convention each signatory nation must establish a Central Authority for service of judicial documents which originate from other signatory nations. Article 2, App., 27a. If the documents satisfy the requirements of the Hague Service Convention, the Central Authority must serve the documents. Articles 2-4, App., 27a. The Central Authority has the right to require that the judicial documents to be served be translated into the official language of the nation of the recipient. Article 5, App., 27a.

The United States of America ratified the Hague Service Convention in 1969. 20 U.S.T. 361. The Federal Republic of Germa-

ny ratified the Hague Service Convention in 1979. At that time Germany exercised its option and specified that judicial documents must be "written in, or translated into, the German language." App., 46a. Pursuant to the authority granted by Article 21 of the Treaty, Germany rejected Article 10 of the Hague Service Convention which would allow direct transmission of judicial documents to German nationals in Germany as an alternative to use of the Central Authority. App., 46a.

Because the Hague Service Convention is in force between the United States of America and the Federal Republic of Germany, the strictures of this treaty require that it be applied in all cases where pleadings such as a summons and complaint are to be served on a German national in West Germany. Thus, a plaintiff can only serve process by using the Central Authority designated under German law and must translate the pleadings into German.

This Litigation

This is a products liability action in which Defendant-Respondent Alpha International ("Alpha") is alleged to be the distributor in the United States of a device made by Petitioner in Germany. TPDa 11*. On December 20, 1985, an order was entered permitting Respondent Alpha to file and serve a third party complaint asserting claims for contribution, indemnification and breach of warranty against Petitioner Karl Schermer & Co. TPDa 16; 18. Alpha unsuccessfully attempted to serve the third party complaint upon Karl Schermer & Co. in Germany and ultimately agreed to have service made in accordance with the Hague Convention. App., 18a. Then Alpha apparently decided to flaunt the treaty and on September 2, 1986, before Petitioner was a party to the action, Alpha filed a motion pursuant to

*"TPDa" refers to the Appendix filed with the Supreme Court of New Jersey.

N.J. Court R. 4:4-4(i) for leave to serve the third party complaint against Karl Schermer upon Allianz Insurance Company in California. TPDa 21. Allianz Insurance Company is sometimes employed on a "piecework" basis by Karl Schermer's German insurance carrier Allianz Versicherungs-AG to do work similar to that done by American insurance adjusters. App., 24a. On October 10, 1986, an order was entered permitting substituted service of the third party complaint against Karl Schermer on Allianz Insurance Company in California. TPDa 27.

After eventually receiving the third party complaint, Karl Schermer filed a motion on November 21, 1986, to vacate the order and to quash service of process because it failed to comply with the Hague Service Convention. TPDa 28. Karl Schermer asserted that it could be served *only* pursuant to the provisions of the Hague Service Convention and that Respondent was obligated to comply with the federal law requirements of the Hague Service Convention in this case. TPDa 29.

Karl Schermer supplied sworn documentary testimony that Allianz Insurance Company did not and never had insured Karl Schermer and was not an agent to receive process on behalf of Karl Schermer. App., 22a. Allianz Insurance Company and Allianz Versicherungs-AG are separate companies, each writing their own policies and handling the claims arising out of those policies. App., 25a. On occasion if asked in some cases involving insureds of the separate German company, Allianz Versicherungs-AG, Allianz Insurance Company also acts as an independent adjusting company for Allianz Versicherungs-AG. App., 24a. Allianz Versicherungs-AG pays Allianz Insurance Company for its services in such cases. App., 24a.

The Ruling of the Court Below

The Superior Court of New Jersey, Law Division, Union County, denied Karl Schermer's motion to quash service notwithstanding non-compliance with the Hague Service Conven-

tion. App., 4a. The court found that since there appeared to be a relationship between Allianz Insurance Company and Allianz Versicherungs-AG of West Germany and because Karl Schermer had apparently ultimately received the summons and complaint, the substituted service of process was sufficient to comply with due process of the law. App., 4a-5a. The court found that the Hague Service Convention was to be invoked only "where plaintiff fails to establish that either an officer, director, transferee or manager or general agent of the defendant or any person has been authorized by appointment or by law to receive service of process on its behalf." App., 2a.

Karl Schermer's motions for leave to appeal to the Superior Court of New Jersey, Appellate Division, and the Supreme Court of New Jersey were denied. App., 7a-8a.

The decision of the Superior Court, Law Division, from which the appellate courts denied leave to appeal, is a final decision under 28 U.S.C. § 1257. The New Jersey courts have finally rejected Petitioner's claims under a federal treaty, and further proceedings in the New Jersey courts would result in irreparable infringement of petitioner's federal treaty rights. Since the federal treaty issue raised by Petitioner is unrelated to the merits of this case and is not effectively reviewable following further proceedings on remand, this Court has jurisdiction to grant certiorari. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481-83 (1975).

REASONS FOR GRANTING THE WRIT

1. The Superior Court of New Jersey Has Given State Court Rules Precedence Over The Hague Service Convention, a Federal Treaty, in Conflict with Numerous Other Decisions and in Violation of the Supremacy Clause of the United States Constitution.

A.

The language and purpose of the Hague Service Convention are violated by the ruling of the New Jersey Superior Court which elevates a state court procedural rule for service of process over an important international treaty. The Preamble to the Hague Service Convention is written in mandatory language which "would purport to describe the procedures for all permissible transnational [service of process] and exclude all other existing practices." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court,* U.S. , , 55 U.S.L.W. 4842, 4845 (no. 85-1695, decided 6/15/87). Indeed this Court has specifically contrasted the "mandatory" language in the Hague Service Convention with the discretionary language of an analogous treaty. *Id.* at n. 15.

Despite these statements, the mandatory language of the Hague Service Convention (see 4-5 *infra*) and the Supremacy Clause of the U.S. Constitution, there is a deep rift between the courts of this country over when and how to honor the Hague Service Convention. A growing number of courts follow the approach taken by the court below and hold that if service can be made pursuant to a federal or state statute or rule or on an agent, related company or, as here, a company with a name similiar to that of the defendant's insurance carrier, the Treaty provisions on service of process may be ignored. *Lamb v. Volkswagenwerk Aktiengesellschaft,* 104 F.R.D. 95 (S.D. Fla. 1985); *Ex Parte Volkswagenwerk Aktiengesellschaft,* 443 So. 2d 880 (Ala. 1983); *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 145 Ill.App.3d 594, 99 Ill. Dec. 379, 495 N.E.2d 1114 (App. Ct. 1986), app.

den., 112 Ill. 2d 595 (1986), pet. for *cert.* pending, 55 U.S.L.W. 3476 (no. 86-1052, 1/13/87); *A.J. McNulty & Co., Inc. v. Rocamat,* 132 Misc. 2d 1064, 506 N.Y.S. 2d 393 (Sup. Ct. 1986); *McHugh v. International Components Corp.,* 118 Misc. 2d 489, 461 N.Y.S. 2d 166 (Sup. Ct. 1983); *Sandoval v. Honda Motor Co. Ltd.,* A.2d (Pa. Super. Ct. 6/16/87, no. 01498 Pittsburgh 1986). *Accord, International Controls Corp. v. Vesco,* 593 F.2d 166, 179-80 (2d Cir. 1979), *cert.* denied, 442 U.S. 941 (1979) ("much to be said in support of the view that, even if the Convention were applicable, the Convention was not intended to abrogate the methods of service prescribed by F.R.C.P. Rule 4"); *Tamari v. Bache & Co. (Lebanon) S.A.L.,* 431 F. Supp. 1226 (N.D. Ill. 1977), aff'd, 565 F.2d 1194 (7th Cir. 1977), *cert.* denied, 435 U.S. 905 (1978) (Hague Service Convention held not applicable as long as the service was in compliance with due process); *Lisman v. Sieger,* 106 F.R.D. 194 (N.D. Ill. 1985) (defense of insufficient service of process held waived but Hague Service Convention would be deemed not to supercede Federal Rules of Civil Procedure); *Sacotte v. Ideal-Werk Krug & Priester Machinen-Fabrik,* 121 Wis. 2d 401, 359 N.W. 2d 393 (1984) (remanded to determine whether service of process on German company's American attorney in U.S. or on German company's exclusive U.S. distributor satisfies Hague Service Convention).

By contrast, other courts correctly hold that as a treaty, the Hague Service Convention supercedes state and federal rules for service of process and that such rules cannot be interpreted so as to violate the Hague Service Convention. *Ackerman v. Levine,* 788 F.2d 830 (2d Cir. 1986); *Harris v. Browning-Ferris Industries Chemical Services, Inc.,* 100 F.R.D. 775 (M.D. La. 1984); *Richardson v. Volkswagenwerk, A.G.,* 552 F. Supp. 73 (W.D. Mo. 1982); *Kadota v. Hosogai,* 125 Ariz. 131, 608 P.2d 68 (1980); *Dr. Ing H.C.F. Porsche A.G. v. Superior Court,* 123 Cal. App. 3d 755, 177 Cal. Rptr. 155 (Third Dist. 1981); *Cintron v. W & D Machinery Co.,* 182 N.J. Super. 126, 440 A.2d 76 (Law Div. 1981);

Rissew v. Yamaha Motor Co. Ltd., 515 N.Y.S.2d 352 (App. Div. 1987); *Low v. Bayerische Motoren Werke, A.G.*, 88 A.D. 2d 504, 449 N.Y.S.2d 733 (App. Div. 1982); *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130 (R.I. 1985). *Cf., Mommsen v. Toro Co.*, 108 F.R.D. 444 (S.D. Ia. 1985) (cannot serve process by direct mail under Hague Service Convention).

This important issue is arising with increasing frequency and will continue to remain an unsettled question of law until finally decided by this Court. In the meantime service of process on a foreign national is regressing to the pre-Hague Service Convention Tower of Babel stage. As demonstrated by reference to the citations above, whether a foreign national's rights and privileges under the Hague Service Convention will be honored depends on whether the alleged tort occurred in Alabama (treaty superceded; *see Ex Parte Volkswagenwerk Aktiengesellschaft, supra),* or Arizona (treaty honored; *see Kadota v. Hosogai, supra)* and even whether in Hudson County, New Jersey, where the treaty is honored *(see Cintron v. W & D Machinery Co., supra)* or some fifteen miles away in Union County, New Jersey, where it is not honored (this case). Foreign nationals do not know when or where their rights and privileges under the Treaty will be honored. Foreign nationals do not know when, under what circumstances and in what language they will receive service of process. Foreign nationals do not know and cannot predict the number and time of entry of default judgments against them because substituted service of process was never received. The only way to restore the Hague Service Convention guarantees to foreign nations (and to American companies should foreign courts follow this country's lead in disregarding the Treaty) is for this Court to resolve this disputed question of law.

B.

It is established beyond peradventure that a treaty is the law of the land under the Supremacy Clause of the United States Con-

stitution. *United States v. Pink*, 315 U.S. 203, 230 (1942). Under the Supremacy Clause and the terms of this Treaty, it is defendant-Petitioner Karl Schermer & Co. which must be served, not Karl Schermer's insurance carrier or another company.

Instead of honoring the treaty and its mandatory language, the Superior Court of New Jersey undertook an *ad hoc* analysis of whether there was any entity which could be served with process in the United States under New Jersey Court Rule 4:4-4(i). A state court, however, has no authority to elevate its own procedural rules for service of process over a treaty which specifically outlines mandatory procedures for service of process in a case like this. *See* U.S. Const., Art. VI, cl. 2; *United States v. Pink*, 315 U.S. at 230-31 ("state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement"). The Hague Service Convention is eviscerated when each federal, state and county court is permitted to do its own *ad hoc* analysis of whether the facts warrant following the Treaty.

In the face of this and other decisions ignoring the Treaty, the Treaty loses its meaning. It must not be forgotten as outlined above at 4-5 that the original purpose of the Treaty was to eliminate the patchwork of procedural rules confronting foreign nationals who are to serve and receive process. *See DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 287-88 (3rd Cir. 1981), *cert.* denied, 454 U.S. 1085 (1981).

C.

In its violation of the Supremacy Clause, the decision of the court below eliminates the guarantees of the Hague Service Convention for Petitioner and hundreds of other foreign nationals which are similarly situated. The issue presented by this Petition is of extreme importance to foreign countries doing business in the United States. The Federal Republic of Germany has joined in this Petition (App., 9a) and Germany as well as Japan and

Great Britain have joined in the petition for certiorari in *Volkswagenwerk Aktiengesellschaft v. Schlunk, supra,* which raises a related issue (App., 11a-16a). The impact of this case on foreign companies is significant. The insurance company for Petitioner is one of the largest insurance companies in Europe. If the theory espoused by the state court in this case is adopted in other jurisdictions, then every foreign national insured by a foreign insurance company could be served with process in an American law suit if the process, written in English, is dropped off in America, bypassing the Hague Service Convention. This would strip thousands of foreign nationals in Germany alone of their rights and privileges under the Hague Service Convention and would be a bold and unauthorized intrusion into the foreign policy and foreign relations of this country.

The issue should be of equal importance to all American companies which do business overseas as well. If American courts continue to expropriate Hague Service Convention rights, then there is no reason why the sister nation signatories to the Treaty should honor the Treaty overseas. American companies which are named as defendants in suits in European countries or Japan will have summonses and complaints written in German or Japanese left on the doorstep of a company employed by their insurers or left with a related company which a Japanese, German or French court may decide on an *ex parte* basis without a hearing is the agent of the American defendant.

This Court should stop such an intrusion and end the conflict between states as to when and under what circumstances the Hague Service Convention will apply. The Petition for a Writ of Certiorari should be granted.

2. Substituted Service of Process in Contravention of the Hague Service Convention Violates Due Process of Law.

This Court has long held that although "[m]any controversies have raged about the cryptic and abstract words of the Due Pro-

cess Clause . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The fundamental requirement of due process is notice which is

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Id., 339 U.S. at 314 (citations omitted), *quoted with approval* in *Greene v. Lindsey*, 456 U.S. 444, 449-50 (1982).

However, "process which is a mere gesture is not due process". *Mullane*, 339 U.S. at 315. This Court has held, for example, that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable. *Schroeder v. New York*, 371 U.S. 208, 212 (1962). Similarly, notice in an indirect manner such as by publication has been held to fall short of the requirements of due process where there are no compelling or even persuasive reasons why direct notice cannot be given. *See Walker v. Hutchinson*, 352 U.S. 112, 116 (1956).

It is acknowledged that substituted service may under certain circumstances be adequate to meet the requirements of due process. *Milliken v. Meyer*, 311 U.S. 457 (1940). However, "[i]ts adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard." *Id.*, 311 U.S. at 463.

The type of substituted service endorsed by the court below does not rise to this level. Service was not made personally upon any agent or corporate appendage of defendant but rather was sent to an American company which does adjusting work for defendant's German insurance carrier on a piecework basis. Although the complaint here found its way to Germany, there is no general guarantee service of process would be forwarded diligently if at all under similar circumstances. It is questionable when, if ever, process will be received when served under rules which ignore the Hague Service Convention and were designed for use with American defendants; whether the complaint will be comprehensible when it is received, and whether it will be received by the proper company in time to retain counsel overseas, enter a defense and exercise rights such as removal to a federal court.

All of these problems were recognized by the United States Senate when it ratified the Hague Service Convention. The language of the Hague Service Convention specifically states that it was adopted to eliminate the variety of problems which arise when something less than personal service is attempted on a foreign national. The Hague Service Convention sets forth a specific procedure for service of process.

Where such a treaty exists and is under the United States Constitution the supreme law of the land, substituted service must be found to be less than satisfactory and not in accordance with due process of law. It should be emphasized that substituted service is generally treated as the exception, not the rule. Indeed, where substituted service of process is used to serve a defendant's insurance company, such service has been permitted only "where . . . it appears from an adequate investigation that the defendant cannot be served by any of the prescribed modes, it is appropriate to order substituted service under Rule 4:4-4(i)." *Feuchtbaum v. Constantini*, 59 N.J. 167, 181, 280 A.2d 161, 168 (1971). This procedure is manifestly inappropriate here where Respondent

concededly knows where the Petitioner is, has a procedure by which it may serve Petitioner and simply chooses to take the easy way out, trotting down to the local court house for an order allowing substituted service.

The use of substituted service where the Hague Service Convention procedures are available and the defendant is amenable to service through the Hague Service Convention violates due process of law. For the reasons stated above, this petition for a writ of certiorari should be granted to uphold that proposition.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND M. TIERNEY, JR. *
SUSAN M. SHARKO
JEFFREY S. BROWN
SHANLEY & FISHER, P.C.
131 Madison Avenue
Morristown, New Jersey 07960
(201) 285-1000
Counsel for Petitioner
KARL SCHERMER & CO.

* *Counsel of Record*

Dated: July 1987

APPENDIX

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

MILTON A. FELLER
Judge

[SEAL]

Court House
Elizabeth, New Jersey
07207

January 6, 1987

Robert F. Calquhoun, Esq.
Colquhoun & Calquhoun
165 South Street
Morristown, New Jersey 07960

Jeffrey S. Brown, Esq.,
Shanley & Fisher
131 Madison Avenue CN 1979
Morristown, New Jersey 07960-1979

LETTER OPINION

Robert A. Ungvary, Esq.
Forman, Forman, Cardonsky,
Andril & Bzura
125 Broad Street
Elizabeth, New Jersey 07201

Douglas Kleinfeld, Esq.
Kleinfeld & Kleinfeld
144 Main Street
Hackensack, New Jersey 07601

Re: Fernando Macri and Sonia Macri, plaintiffs v. Bermelon, Inc., Alpha International and Max Cohen, defendants, and Alpha International, third party plaintiff v. Karl Schermer & Co., third party defendant.
Docket No. L 012890-85

Gentlemen:

This is to inform you that the motion regarding the above-referenced matter for the entry of an order quashing service of pro-

cess on third party defendant, Karl Schermer & Co., dismissing the third party complaint for insufficnecy of service of process, which service was permitted by order of this court dated October 10, 1986, and compelling third party plaintiff, Alpha International, to comply with the requirements of the Hague Convention, heard on December 5, 1986 is hereby denied for the following reasons:

The relatively recent case of *Cintron v. W & D Machinery Co., Inc.* 182 *N. J. Super* 126 (Law Div. 1981) explains the law concerning the applicability of the Hague Convention. The objectives of the Hague Convention are three-fold: (1) it creates a new and specific governmental method of service of documents from abroad by each signatory state; (2) it regulates previous methods of service; and (3) it regulates the method for obtaining default judgments when documents are served abroad. *Id.* at 128.

In *Cintron,* the Court makes it clear, however, that the Hague Convention does not mandate a blanket application. Rather, it is to be invoked where plaintiff fails to establish that either an officer, director, transferee or managing or general agent of the defendant or any person has been authorized by appointment or by law to receive service of process on its behalf. *Id.* at 134.

For example, in *Isothermics v. U.S. Energy Research & Dev. Agcy.,* 434 *F. Supp.* 1155 (D.C.N.J. 1977), a Japanese defendant, Furukawa Electric Co., Ltd., sought compliance with the Hague Convention after being served by mail pursuant to F.R. Civ. P. 4 (i) (1) (D). The court did not find it necessary to decide the issue, concluding that defendants, "even if not effectively served with process, are at least on notice of Iso's [plaintiff's] claim." *Id.* at 1158.

Substituted service on a defendant is specifically authorized by the New Jersey Rules of Court, *R.* 4:4-4(i), which provides:

> If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court, consistent with due process of law.

Due process requires merely a method "reasonably calculated" to notify the adverse party of the proceeding, *Mullane v. Central Hanover Bank & Trust Co.*, 339 *U.S.* 306, 70 *S. Ct.* 652, 94 *L. Ed.* 865 (1950).

In *Feuchtbaum v. Constantini*, 59 *N.J.* 167 (1971) the court held that with respect to an insured defendant an order may be entered permitting service on that defendant by serving the insurance company. *Id.* at 178.

There the court articulated that due process is satisfied upon a weighing of "the plaintiff's need, the public interest, the reasonableness of plaintiff's efforts under all the circumstances to inform the defendant, and the availability of other safeguards for the defendant's interests." *Id.* at 177. In striking the balance in favor of plaintiff, the court reasoned that:

> By its contract the carrier has the right and the duty to defend any action against the insured. The carrier thus has a representative role, which, though it does not include an express agency to accept service of process, is nonetheless relevant when process cannot otherwise be served upon the insured. Realistically, there is more of a chance that defendant will learn of the suit by such service than through available alternatives, for the carrier is likely to have an interest in finding him.

Substituted service under *R.* 4:4-4(i) has also been permitted in a medical malpractice case where the defendant had left this country. In *Muntz v. Smaily*, 118 *N.J. Super.* 80 (App. Div. 1972) the Court held that where a physician charged with medical malpractice left the State after committing the act complained of to take up residence in Iran, the victim's widow was permitted to execute service of process under *R.* 4:4-4(i) through substituted service on the insurance carrier for the physician's employer's hospital and by both registered and ordinary mail to the physican's last known address.

There is no specific language in *R.* 4:4-4(i) limiting service under that rule to a particular type of case. *Feuchtbaum* and *Muntz* are not to be read to restrict substituted service under *R.* 4:4-4(i) to insurance carriers in automobile negligence and medical malpractice cases. *Houie v. Allen,* 192 *N.J. Super.* 517 (App. Div. 1984).

Moreover, in the case of *Young v. Bunny Bazaar,* 107 *N.J. Super.* 32 (Law Div. 1969), the Court refused to recognize a distinction between service of process upon an insurance adjuster and the insurance carrier. Service of process upon the adjuster was sufficient where the insurance carrier was served and the carrier was aware of the accident all along. *Id.* at 327.

In the instant matter, therefore, substituted service on the defendant's insurance carrier is authorized if it is consistent with due process requirements enunciated in *Mullane* and embodied in the balancing test applied by the court in *Feuchtbaum. Houie* at 522.

Third party plaintiff's need is evident enough. It is alleged that plaintiffs have been injured by a product distributed by Alpha and manufactured by the third party defendant, Karl Schermer & Co. Also, it is in the public interest that all parties responsible for the alleged torts against plaintiff be parties to the suit to remedy said alleged injuries. Moreover, defendant does not deny that he has been noticed. A certification by the managing director of Karl Schermer & Co., Mr. Edwin Melcher, demonstrates sufficient notice and full knowledge of the lawsuit. Furthermore, it is clear by the certification of Mr. Melcher that he understands and speaks English as his certification is in the English language.

In addition, to satisfy due process requirements the party seeking substituted service on an insurance carrier must make a prima facie showing that the claims being asserted are covered by insurance. *Houie* at 522. Concerning this issue there is a sharp discrepancy between the proofs presented by Alpha and the certification submitted by and on behalf of Karl Schermer & Co.

Alpha contends that Allianz Insurance Company of California is the insurance carrier for Karl Schermer & Co.; defendant contends, however, that Allianz Insurance Company of California is merely the adjuster company for Allianz Versicherungs-AG of West Germany, who is the insurance carrier for Karl Schermer.

These letters submitted by Alpha are of course in direct contradiction to a certification submitted on Karl Schermer's behalf, by Ruth A. Rinsema, manager of the claims department of Allianz Insurance Co. of California. Paragraph number five, however, of Ms. Rinsema's certification dated December 10, 1986, demonstrates a strong association between Allianz Insurance Co. of California and Allianz Versicherungs-AG, Germany. Her statement strongly suggests that Allianz Insurance Co. of California may indeed have the authority to act on behalf of Allianz Versicherungs-AG.

Moreover, letters written by Ms. Rinsema on behalf of Allianz Co. of California absolutely unambiguously state that Allianz does indeed carry an insurance policy for Karl Schermer.

It is the opinion of this court that third party plantiff Alpha has met its burden of showing prima facie that the claims asserted against defendant are covered by Allianz Insurance Co. of California.

Substituted service on Allianz Insurance Co. of California was, therefore, proper and sufficient under the due process requirements of *Mullane*. And in light of *Feuchtbaum* and *Young*, the balance must be struck in favor of third party plaintiff, Alpha International.

Accordingly, the appropriate signed order is enclosed.

Very truly yours,

Milton A. Feller, J.S.C.

MAF:ajm
Encl.

Colquhoun & Colquhoun
A Professional Corporation
165 South Street
Morristown, N.J. 07960
(201) 540-0500
Attorneys for Defendant
Alpha International

Plaintiff FERNANDO MACRI, et al *vs.* BERMELON, INC, et al *vs.* *Defendant* Third Party KARL SCHERMER & CO.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY *Docket No.* L-012890-85 *CIVIL ACTION* ORDER

This matter being opened to the Court by Shanley & Fisher, PC attorney for Karl Schermer & Co., and the following attorney(s) appearing for the parties as indicated:

ATTORNEYS:	*PARTIES:*
Robert F. Colquhoun	Alpha International

and the court having considered the briefs, affidavits and argument of counsel and the applicable law,

It is, this 6th day of JANUARY, 1987, ORDERED THAT defendant third party Karl Schermer & Co.'s motion to quash service of third party complaint be and hereby is denied.

/s/ MILTON A. FELLER
MILTON A. FELLER, J.S.C.

ORDER ON MOTION

AM-623-86T5

FERNANDO MACRI AND

SONIA MACRI

VS.

BERMELON, INC., ET AL

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-623-86T5
MOTION NO. M-2309-86
BEFORE PART: D
JUDGE(S): MICHELS
O'BRIEN
SKILLMAN

MOTION FILED: JANUARY 21, 1987
ANSWER(S) FILED: FEBRUARY 2, 1987 BY: ALPHA INTERNATIONAL

DATE SUBMITTED TO COURT: FEBRUARY 9, 1987

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 11th DAY OF FEBRUARY, 1987, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION BY APPELLANT KARL SCHERMER & CO. FOR LEAVE TO APPEAL AND SUMMARY DISPOSITION		X	X

SUPPLEMENTAL:

The motion is denied in all respects.

FOR THE COURT:

/s/ HERMAN D. MICHELS

HERMAN D. MICHELS, P.J.A.

SUPREME COURT OF NEW JERSEY
M-868 September Term 1986
M-869

26,852

FERNANDO MACRI AND SONIA MACRI, *Plaintiff-Respondents,* *vs.* BERMELON, INC., et al., *Defendants-Respondents.* and ALPHA INTERNATIONAL, *Third Party Plaintiff-Respondent,* vs. KARL SCHERMER & COMPANY, *Third Party Defendant-Movant.*	ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal (M-868) is denied; and it is further

ORDERED that the motion to expand the record (M-869) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 28th day of April, 1987.

/s/ STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT

[Letterhead of Embassy of Federal Republic of Germany]

RK 521 SE Schermer

March 2, 1987
K-St

Shanley & Fisher
Attn.: Jeffrey S. Brown, Esq.
131 Madison Avenue
CN-1979
Morristown, NJ 07960-1979

Re: Macri v. Alpha International v. Karl Schermer & Company

Dear Mr. Brown:

In reply to your letter of February 27, 1987, I am forwarding to you enclosed copy of a note dated January 22, 1987, which this Embassy addressed to the US Department of State in re: Herwig J. Schlunk and Sylvia Schlunk v. Volkswagen AG.

The note addresses the same problem with which the defendant is confronted in the above mentioned case.

In Alpha International v. Karl Schermer & Co., there even appear to be two violations of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or commercial Matters ratified by both the Federal Republic of Germany and the United States.

As stated in its Article 1, the Convention shall apply *in all cases*, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

The Federal Republic of Germany has rejected the option, embodied in Article 10 of the Hague Service Convention, that would allow direct transmission of judicial documents to Ger-

man nationals in Germany. Therefore, the plaintiff must utilize the Central Authority designated under the Convention, must translate the pleadings into the German language, and must afford the defendant sufficient time to frame responsive pleadings.

I understand that, in the present case, the documents to be served were first sent by mail to the defendant in Germany and, in a second attempt, to an American subsidiary of the defendant's insurer.

Both attempts are clear violations of the Hague Service Convention which was negotiated to accomodate the requirements of the law of all signatory nations and, therefore, does neither allow for service by mail against the objections of the State of destination (see Article 10 of the Convention) nor for the service to an involuntary agent or insurer.

Thus, effective service to Karl Schermer & Co. can only be made through the Central Authority designated by the Federal Republic of Germany under Articles 2 and 18 para. 3 of the Convention.

Sincerely yours,

/s/ ELFRIEDE G. KRÜGER

Elfriede G. Krüger
Counselor and Consul General

cc: Assistant Legal Adviser, Private International Law,
US Department of State

[Letterhead of The Embassy of the Federal Republic of Germany]

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to bring to the Department's attention a court decision which is likely to have serious adverse effects on international litigation in civil and commercial matters.

In in re Herwig J. Schlunk as Administrator of the estates of Franz J. Schlunk and Sylvia Schlunk, vs Volkswagen AG, the Appellate Court of Illinois, applying Illinois law, held that plaintiff need not comply with the provisions of the Hague Convention on service abroad of judicial and extrajudicial documents in civil or commercial matters when serving a summons and complaint on the German Volkswagen AG, but that it was sufficient to serve those documents on Volkswagen America, Inc., a subsidiary of Volkswagen AG organized under the Laws of New Jersey, which was characterized in the decision as an involuntary agent of Volkswagen AG.

Volkswagen AG has filed a petition for a writ of certiori challenging the Illinois Appellate Court's decision.

Other courts have recently come to similar conclusions and have put into question an established practice of service under the Convention confirmed by both federal and state courts throughout the years. Therefore, the Federal Republic of Germany attaches great importance to the Illinois Appellate Court's decision being reviewed by the Supreme Court of the United States.

The decision of the Appellate Court of Illinois is in conflict with the letter and the spirit of the Convention and ignores its mandatory character.

Serving process on a domestic subsidiary of a foreign corporation frustrates the declared purpose of the Hague Service Convention which is to ensure that documents "be brought to the notice of the addressee in sufficient time" and, if the receiving contracting State so requires, in its language, so as to enable a foreign defendant to defend an action in a foreign language and over a distance of several thousand miles. Such a practice rather produces effects similar to those of a notification au parquet which the signatories to the Convention intended to exclude by the provisions of Article 15 and 16 of the Convention.

Furthermore, letting stand the Illinois Court's decision based upon a doubtful involuntary agent rationale, would mean that foreign defendants, whether corporations located in or private persons residing in a contracting State, could no longer rely upon a uniform method of service being applied by the United States. It would be left to the courts of fifty states to decide whether or not the Convention was to be applied in a particular case, and foreign defendants would see themselves confronted with various different methods of service depending on the procedural law of the forum state.

Such a development would eviscerate the Hague Service Convention and throw its signatories back to the confusion existing prior to its ratification.

It would be contrary to the intentions of the framers of the Convention who meant to put an end to that state of confusion by agreeing on mandatory unified procedures of notification and would lead to inproductive and costly litigation for both American plaintiffs and foreign defendants.

The Embassy would very much appreciate it if the Department were to convey the German position to the Supreme Court of the

United States and to join in to defend an international convention which has proved to be beneficial to all of its signatory nations.

Washington, D.C., January 22, 1987

Department of State
Washington, D.C.

[Letterhead of Embassy of Japan]

April 7, 1987

E-52

The Embassy of Japan presents its compliments to the Department of State and has the honor to inform the latter, upon instruction from the home Government, the following:

1. The Government of Japan shares the common concerns expressed by the Note dated January 22, 1987 addressed to the Department of State by the Embassy of the Federal Republic of Germany in Washington, D.C. and to support the conclusion expressed in said note that the role played by the Hague Service Convention on both simplification for service and the protection for the person to be served should be duly evaluated and that the domestic procedures which will impair the intentions of the Convention are undesirable.

2. It, therefore, expresses its expectations that the views both of the Government of Japan and of the Federal Republic of Germany should be duly taken into consideration.

The Embassy of Japan avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

NOTE NO. 54

Her Britannic Majesty's Embassy present their compliments to the Department of State and have the honour to draw its attention to the petition for Writ of Certiorari filed in the Supreme Court of the United States in the case of Volkswagenwerk Aktiengesellschaft v Herwig J Schlunk as Administrator of the Estates of Franz J Schlunk and Sylvia Schlunk.

This case involves an appeal against a judgement in the First District Appellate Court of Illinois in which the service of judicial documents upon a foreign defendent abroad has been ordered in accordance only with local state law. By labelling a domestic subsidiary of the German corporation concerned as an involuntary agent for service, the State Court avoided compliance with the provisions of the Hague Convention on the Service Abroad of judicial and extra-judicial documents in civil or commercial matters.

The Hague Service Convention was entered into by the contracting states so as to establish an agreed international method to simplify and expedite the transmission of judicial documents for service abroad. In ratifying its terms the signatory countries were desirous of creating a uniformly applicable system that would ensure effective service, under most circumstances, and afford the defendant abroad sufficient time to prepare a defence. The extensive coverage, the use of forms and the provisions for translation were designed to foster the uniform acceptability and efficacy of the Convention. The Appellate Court's decision is contrary to the essence of the Hague Service Convention.

Furthermore, the Supreme Court has held that international treaties be construed liberally. The Hague Service Convention applies to the service abroad of judicial documents. As, in this instance, where service necessarily involves the transmission of documents abroad, the Convention must be construed in the liberal spirit in which it was intended, in order to mitigate the inconsistencies and hardships that the drafters sought to redress.

The interpretation of the Appellate Court allows the application of the Convention to be determined by local State law. The reasonable expectation of signatories that the provisions of the treaty will be adopted uniformly should not be frustrated by the inconsistencies in the service rules of the fifty different states of the Union. More specifically, manufacturers of signatory nations will be exposed to similar uncertainties where they have United States dealings that may be characterised only locally as quotes agents unquotes. State laws should yield when they are incompatible with or intrude upon the interpretation of a multi-lateral treaty entered into by the United States to ensure consistent international practice.

In addition, where a defendant's nation does not recognise the service methods as valid, a question as to the enforceability in that nation, of any judgement subsequently procured may legitimately be raised. Compliance with the comparatively straightforward provisions of the Convention can give rise to no such grounds.

Her Majesty's Government believes that it is important to uphold the uniform interpretation and application of this international treaty in the interests of the efficient conduct of international civil and commercial litigation.

Her Britannic Majesty's Embassy would be obliged if the Department of State could take the above views into account in formulating the position of the United States Government towards the present petition.

Her Britannic Majesty's Embassy avail themselves of the opportunity to renew to the Department of State the assurances of their highest consideration.

BRITISH EMBASSY
WASHINGTON DC

24 MARCH 1987

[SEAL]

[Letterhead of Shanley & Fisher, P.C.]

October 6, 1986

Hon. Milton A. Feller
Superior Court
Court House
Elizabeth, N.J. 07207

Re: Macri v. Bermelon
Docket No. L-012890-85

Dear Judge Feller:

It is my understanding that defendant's motion for "Leave for Substituted Service of Third-Party Complaint on Allianz Insurance Co." is scheduled to be heard before Your Honor on October 10. I represent Karl Schermer & Co. which has been named as a third-party defendant. However, I must make it clear that I am not entering an appearance at this time in this matter on behalf of Karl Schermer & Co. but simply advising the Court and counsel of what I know.

The motion by defendant's counsel is to serve the Third-Party Complaint on "Allianz Insurance Company of Los Angeles, California". I am in receipt of a copy of Mr. Colquhoun's Certification in Lieu of Affidavit and there are several inaccuracies therein. First he states that attempts have been made to serve the third-party defendant in West Germany but they have refused to accept such service. The fact of the matter is that Karl Schermer & Co. is resident in the Federal Republic of Germany and service upon a West German company is governed by a multilateral international treaty known as the Hague Convention to which both West Germany and the United States are signatories. This treaty applies in all civil and commercial cases "where there is occasion to transmit a judicial or extrajudicial document for service abroad", Hague Convention, Article I, 20 U.S.T. 361 (1969). Service of the Third-Party Complaint in this matter was not

made in accordance with the Hague Convention for, among other reasons, a German translation of the Complaint did not accompany the Service. Defective service was acknowledged by Mr. Colquhoun in a conversation that he and I had approximately three weeks ago. During that conversation Mr. Colquhoun indicated that he was going to see to it that the defective service was corrected and properly executed in accordance with the Hague Convention.

Also, in that telephone conversation he indicated to me that he was going to attempt to serve Allianz Insurance Company in California. Although it is respectfully submitted that service on an insurance company is not permitted when the named defendant can be properly served as long as the Hague Convention is complied with, it should be pointed out to Mr. Colquhoun and the Court that Allianz Insurance Company in California is not the insurer for Karl Schermer & Co. Karl Schermer & Co. is insured by Allianz Versicherungs-AG of Frankfurt, West Germany. Thus, service on Allianz Insurance Company in California would not bring the insurance policy into play. I bring the above to Your Honor's attention since it seems to me that if service is properly effected in the first instance, we can all avoid the unnecessary time and expense of filing motions to set aside service and to compel compliance with the Hague Convention. In the event that the Court requires the above in affidavit form, I would be pleased to comply.

Respectfully,

SHANLEY & FISHER, P.C.

Raymond M. Tierney, Jr.

RMTjr/ssf

cc: Colquhoun & Colquhoun
Forman, Forman, Cardonsky, Andril & Bzura

SHANLEY & FISHER
A Professional Corporation
131 Madison Ave.
Morristown, N.J. 07960-1979
(201) 285-1000

FERNANDO MACRI and SONIA MACRI *Plaintiffs,* vs. BERMELON, INC., ALPHA INTERNATIONAL and MAX COHEN *Defendants,* vs. ALPHA INTERNATIONAL, *Third Party Plaintiff,* vs. KARL SCHERMER & CO., *Third Party Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY *Docket No.* L-012890-85 CERTIFICATION IN LIEU OF AFFIDAVIT

Ruth A. Rinsema, of full age, upon my oath certifies as follows:

1. I am employed by Allianz Insurance Company, 6435 Wilshire Blvd., Los Angeles, California 90048, as Manager, GLB Claims Department. As such I am authorized to make this Certification on its behalf. I am thoroughly familiar with the operations of Allianz Insurance Company and make this Certification of my own personal knowledge.

2. I make this Certification in support of third party defendant, Karl Schermer & Company's application for an Order quashing service of process, dismissing the Complaint for insufficiency of process and compelling third party plaintiffs to fully comply with the requirements of the Hague Convention in serv-

ice of process upon third party defendant, Karl Schermer & Company.

3. As Manager of the GLB Claims Department, I have custody, control and access to Allianz Insurance Company's policyholder information. Allianz Insurance Company is a California insurance company.

4. I have examined Allianz Insurance Company's pertinent records, to determine whether Karl Schermer & Company is now or was ever an insured of Allianz Insurance Company.

5. Based upon my examination of company records, Karl Schermer & Company is not now, nor has it ever been, an insured of Allianz Insurance Company.

6. Allianz Insurance Company is not an agent to receive service of process on behalf of Karl Schermer & Company nor is any officer, director, transferee, managing agent, general agent or employee of Allianz Insurance Company, Inc. authorized by appointment or by law to receive service of process on behalf of Karl Schermer & Company.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ RUTH A. RINSEMA

Ruth A. Rinsema

Dated: November 10, 1986

SHANLEY & FISHER
A Professional Corporation
131 Madison Ave.
Morristown, N.J. 07960-1979
(201) 285-1000
Attorneys for Third Party Defendant,
Karl Schermer & Co.

FERNANDO MACRI and SONIA MACRI *Plaintiffs,* vs. BERMELON, INC., ALPHA INTERNATIONAL and MAX COHEN *Defendants,* vs. ALPHA INTERNATIONAL, *Third Party Plaintiff,* vs. KARL SCHERMER & CO., *Third Party Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY *Docket No.* L-012890-85 CERTIFICATION IN LIEU OF AFFIDAVIT

Edwin Melcher of full age, upon my oath certifies as follows:

1. I am the Geschäftsführer Managing Director of Karl Schermer & Co. and as such am authorized to make this Certification on its behalf. I am thoroughly familiar with the operations of this Corporation and make this Certification of my own personal knowledge.

2. I make this Certification in support of third party defendant, Karl Schermer & Co.'s application for an Order quashing service of process, dismissing the Complaint for insufficiency of

process and compelling third party plaintiffs to fully comply with the requirements of the Hague Convention in service of process upon third party defendant, Karl Schermer & Co.

3. Karl Schermer & Co. is a corporation organized and existing under the laws of the Federal Republic of Germany with its principal place of business in the Federal Republic of Germany.

4. Karl Schermer & Co. has no officers, directors, transferees, or managing or general agents residing in or employed in the State of New Jersey. Karl Schermer & Co. has no officers, mailing address or telephone listing in the State of New Jersey.

5. Karl Schermer & Co. itself solicits no business in New Jersey, and it is not licensed nor does it do business within the State. There is no officer, director, transferee, managing or general agent, or any person authorized by appointment or by law to receive service of process on its behalf within the State of New Jersey.

6. Sales to United States purchasers of Karl Schermer & Co. manufactured products are arranged by Alpha International, an independent corporation which exclusively represents Karl Schermer & Co.

7. Karl Schermer & Co. is not and has not been insured by Allianz Insurance Co. in California. Karl Schermer & Co. is insured by Allianz Versicherungs-AG of Frankfurt, West Germany.

8. Allianz Insurance Co. is not an agent to receive service of process on behalf of Karl Schermer nor is any officer, director, transferee, managing agent, general agent or employee of Allianz Insurance Co., Inc. authorized by appointment or by law to receive service of process on behalf of Karl Schermer & Co.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

[SEAL]

DATED: Ettlingen, 26 November 1986

SHANLEY & FISHER
A Professional Corporation
131 Madison Avenue
Morristown, N.J. 07960-1979
(201)285-1000

FERNANDO MACRI and SONIA MACRI, *Plaintiffs,* vs. BERMELON, INC., ALPHA INTERNATIONAL and MAX COHEN, *Defendants,* vs. ALPHA INTERNATIONAL, *Third Party Plaintiff,* vs. KARL SCHERMER & CO., *Third Party Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY *Docket No.* L-012890-85 Civil Action CERTIFICATION IN LIEU OF AFFIDAVIT

Ruth A. Rinsema, of full age, upon my oath certifies as follows:

1. I am employed by Allianz Insurance Company, 6435 Wilshire Blvd., Los Angeles, California 90048, as Manager of Claims Department. As such I am authorized to make this Certification on its behalf. I am thoroughly familiar with the operations of Allianz Insurance Company and make this Certification of my own personal knowledge.

2. I make this Certification in support of third party defendant, Karl Schermer & Company's application for an Order quashing service of process, dismissing the Third Party Complaint for insufficiency of process and compelling third party plaintiffs to fully comply with the requirements of the Hague Convention in service of process upon third party defendant, Karl Schermer & Company.

3. As Manager of the Claims Department, I have custody, control and access to Allianz Insurance Company's policyholder information. Allianz Insurance Company is a California insurance company and operates in the United States and Canada only.

4. Karl Schermer & Company is not now, nor has it ever been, an insured of Allianz Insurance Company. Karl Schermer & Company is insured by Allianz Versicherungs-AG of Munich, West Germany. Allianz Insurance Company is not an agent to receive service of process on behalf of Karl Schermer & Company or Allianz Versicherungs-AG, nor is any officer, director, transferee, managing agent, general agent or employee of Allianz Insurance Company authorized appointment or by law to receive service of process of behalf of Karl Schermer & Company or Allianz Versicherungs-AG. Allianz Insurance Company has no authority whatsoever to make any decisions concerning this litigation or to issue settlement authority in this matter.

5. Allianz Insurance Company of California is a separate company from Allianz Versicherungs-AG. Allianz Insurance Company writes its own policies for United States and Canadian companies only and handles the claims arising out of these policies. If asked, Allianz Insurance Company in some cases involving insureds of the separate German Company, Allianz Versicherungs-AG, also acts as an independent "adjusting company" for Allianz Versicherungs-AG. Allianz Versicherungs-AG pays Allianz Insurance Company for its services in these cases.

6. Allianz Insurance Company and Allianz Versicherungs-AG do not share personnel, have separate offices, bank accounts,

claims departments and underwriting departments. Allianz Insurance Company is owned by a United States holding company known as Allianz of America, which is based in Dallas, Texas. The majority of shares of Allianz of America are owned by Allianz AG Holding, a Munich based holding company. Allianz AG Holding also holds the majority of the shares of Allianz Versicherungs-AG and other entities, nationally and internationally.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Ruth A. Rinsema

RUTH A. RINSEMA

DATED: December 16, 1986

CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, DONE AT THE HAGUE NOVEMBER 15, 1965; ENTERED INTO FORCE FOR THE UNITED STATES FEBRUARY 10, 1969; 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163.

with

DESIGNATIONS AND DECLARATIONS BY MEMBER STATES

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

Desiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I—JUDICIAL DOCUMENTS

Article 2

Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from

other contracting States and to proceed in conformity with the provisions of articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either—

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State which are designated by the latter for this purpose.

Each contacting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with—

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service

of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by

a) the employment of a judicial officer or of a person competent under the law of the State of destination.

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.

It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that—

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled—

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document.

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provsions of the present Convention, and a judgment has been entered

against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled—

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defense to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II—EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a contracting State may be transmitted for the purpose of service in another contracting State by the methods and under the provisions of the present Convention.

CHAPTER III—GENERAL CLAUSES

Article 18

Each contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more contracting States to dispense with—

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of article 3.

b) the language requirements of the third paragraph of article 5 and article 7.

c) the provisions of the fourth paragraph of article 5.

d) the provisions of the second paragraph of article 12.

Article 21

Each contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following—

a) the designation of authorities, pursuant to articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to article 9.

Each contracting State shall similarly inform the Ministry, where appropriate, of—

a) opposition to the use of methods of transmission pursuant to articles 8 and 10,

b) declarations pursuant to the second paragraph of article 15 and the third paragraph of article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the parties have otherwise agreed.

Article 25

Without prejudice to the provisions of articles 22 and 24, the present Convention shall not derogate from Conventions contain-

ing provisions on the matters governed by this Convention to which the contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in article 26, and to the States which have acceded in accordance with article 28, of the following—

a) the signatures and ratifications referred to in article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of article 27;

c) the accessions referred to in article 28 and the dates on which they take effect;

d) the extensions referred to in article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in article 21;

f) the denunciations referred to in the third paragraph of article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

ANNEX TO THE CONVENTION

Forms

REQUEST FOR SERVICE ABROAD OF JUDICIAL OR EXTRAJUDICIAL DOCUMENTS

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, _____ 196 .

Identity and address of the applicant

Address of receiving authority

The undersigned applicant has the honour to transmit—in duplicate—the documents listed below and, in conformity with article 5 of the above-mentioned Convention, requests prompt service of one copy thereof on the addressee, *i.e.* (identity and address) ____

(a) in accordance with the provisions of sub-paragraph *(a)* of the first paragraph of article 5 of the Convention *

(b) in accordance with the following particular method (sub-paragraph (*b*) of the first paragraph of article 5) *

(c) by delivery to the addressee, if he accepts it voluntarily (second paragraph of article 5) *

The authority is requested to return or have returned to the applicant a copy of the documents—and of the annexes *—with a certificate as provided on the reverse side.

List of documents

_____

_____

Done at_____the _____
Signature and or/stamp

* Delete if inappropriate.

INTERNATIONAL JUDICIAL ASSISTANCE

Reverse of the request

CERTIFICATE

The undersigned authority has the honour to certify, in conformity with article 6 of the Convention.

1) that the document has been served*

—the (date)

—at (place, street, number)

—in one of the following methods authorized by article 5—

(a) in accordance with the provisions of subparagraph (a) of the first paragraph of article 5 of the Convention*

(b) in accordance with the following particular method*

(c) by delivery to the addressee, who accepted it voluntarily*

The documents referred to in the request have been delivered to

—(identity and description of person)

—relationship to the addressee (family, business or other)

2) that the document has not been served, by reason of the following facts*

In conformity with the second paragraph of article 12 of the Convention, the applicant is requested to pay or reimburse the expenses detailed in the attached statement*

Annexes

Documents returned

_____

_____

Done at ____ the _____

In appropriate cases, documents establishing the service

Signature and/or stamp

_____

_____

* Delete if inappropriate.

SUMMARY OF THE DOCUMENT TO BE SERVED

Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters, signed at The Hague, the _____196 .

(article 5, fourth paragraph)

Name and address of the requesting authority

Particulars of the parties *

JUDICIAL DOCUMENT **

Nature and purpose of the document

Nature and purpose of the proceedings and, where appropriate, the amount in dispute

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Date and place for entering appearance **

Court which has given judgment **

Date of judgment **

Time limits stated in the document **

EXTRAJUDICIAL DOCUMENT**

Name and purpose of the document

Time limits stated in the document**

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* If appropriate, identity and address of the person interested in the transmission of the document.

** Delete if inappropriate.

GERMANY, FEDERAL REPUBLIC OF

Ratified: April 27, 1979
Entered into force: June 26, 1979
Declaration of: April 27, 1979

(1) Requests for service shall be addressed to the Central Authority of the Land where the request is to be complied with. The Central Authority pursuant to Article 2 and paragraph 3 of Article 18 of the Convention shall be for:

Baden-Württemberg	Das Justizministerium Baden-Württemberg (The Ministry of Justice of Baden-Württemberg), D 7000 Stuttgart, West Germany
Bavaria	Das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 Munchen, West Germany
Berlin	Der Senator für Justiz (The Senator of Justice), D 1000 Berlin, West Germany
Bremen	Der Präsident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen, West Germany
Hamburg	Der Präsident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg, West Germany

Hesse	Der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden, West Germany
Lower Saxony	Der Niedersächsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover, West Germany
Northrhine-Westphalia	Der Justizminister des Landes Nordrhein-Westfalen (The Minister of Justice of the Land Northrhine-Westphalia), D 4000 Düsseldorf, West Germany
Rhineland-Palatinate	Das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz, West Germany
Saarland	Der Minister für Rechtspflege (The Minister of Justice), D 6600 Saarbrücken, West Germany
Schleswig-Holstein	Der Justizminister des Landes Schleswig-Holstein (The Minister of Justice of the Land Schleswig-Holstein), D 2300 Kiel, West Germany

The Central Authorities are empowered to have requests for service complied with directly by postal channels if the conditions for service in accordance with paragraph 1(a) of Article 5 of the Convention have been fulfilled. In that case the competent Central Authority will hand over the document to the postal authorities for service. In all other cases the local court (Amtsgericht) in whose district the documents are to be served shall be competent to comply with requests for service. Service shall be effected by the registry of the local court. Formal service (paragraph 1 of Article 5 of the Convention) shall be permissible only

if the document to be served is written in, or translated into, the German language.

(2) The Central Authority shall complete the certificate (paragraphs 1 and 2 of Article 6 of the Convention) if it has itself arranged for the request for service to be complied with directly by postal channels; in all other cases this shall be done by the registry of the local court.

(3) The Central Authority of the Land where the documents are to be served and the authorities competent under Section 1 of the Act of 18th December 1958 implementing the Convention on Civil Procedure, signed at The Hague on 1st March 1954, to receive requests from consuls of foreign States, shall be competent to receive requests for service transmitted by a foreign consul within the Federal Republic of Germany (paragraph 1 of Article 9 of the Convention). Under that Act the president of the regional court (Landgericht) in whose district the documents are to be served shall be competent; in his place the president of the local court shall be competent if the request for service is to be complied with in the district of the local court which is subject to his administrative supervision.

(4) In accordance with paragraph 2(a) of Article 21 of the Convention, the Government of the Federal Republic of Germany objects to the use of methods of transmission pursuant to Articles 8 and 10. Service through diplomatic or consular agents (Article 8 of the Convention) is therefore only permissible if the document is to be served upon a national of the State sending the document. Service pursuant to Article 10 of the Convention shall not be effected.